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No. 78-1630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet., A11-A27) is reported at 589 F.2d 1327. The opinion of the district court is not reported. (Pet., A1-A10).

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1978. A petition for rehearing was denied January 25, 1979. The petition for writ of certiorari was filed April 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether ConRail is entitled to discontinue its Chicago, Ill.-Valparaiso, Ind. passenger train service simply by posting notice of the discontinuance for 60 days, and by notifying certain parties of the discontinuance, under 45 U.S.C. 744(a)(1), or whether ConRail is required to apply to the Interstate Commerce Commission ("I.C.C.") under 49 U.S.C. 13a(1) (or to the appropriate state regulatory agencies).

STATEMENT

This proceeding involves the proposed discontinuance of two pairs of railroad commuter passenger trains between Valparaiso, Ind. and Chicago, Ill., a distance of 44 miles. Two trains operate from Valparaiso to Chicago in the morning, and two trains return from Chicago to Valparaiso in the evening.[1]

The most recent attempt to discontinue part of this passenger train service, prior to enactment of Regional Rail Reorganization Act of 1973 ("3-R Act"),[2] was denied by the I.C.C. in the customary section 13a(1) case under the Interstate Commerce Act. 49 U.S.C. 13a(1).[3] *Pennsylvania R. Co. Discontinuance-Chicago & Valparaiso*, 331 I.C.C. 464 (1968).

[1] Respondents herein are People of the State of Illinois (William J. Scott, Attorney General), Illinois Commerce Commission, City of Chicago, Chicago-Indiana Railroad Commuter Association, and United Transportation Union (John W. McGinness and George B. Lee).

[2] P.L. 93-236 (January 2, 1974). For an understanding of the 3-R Act, generally, see: *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

[3] Recodified as 49 U.S.C. 10908 (P.L. 95-473, October 17, 1978). Congress in 1958 enacted secton 13a to expedite passenger train discontinuance proceedings. See: *New Jersey v. United States*, 168 F. Supp. 324 (D.N.J. 1959), aff'd 359 U.S. 27; *City of Chicago v. United States*, 396 U.S. 162 (1969); *Southern R. Co. v. North Carolina*, 376 U.S. 93 (1964).

However, at the time of the court's decision below, Consolidated Rail Corporation ("ConRail"), successor to the former Penn Cantral Transportation Company's operation of the trains, had not invoked the jurisdiction of the I.C.C. for discontinuance of the trains; likewise, the carrier had not taken the alternative course of seeking approval from each of the state regulatory commissions in Illinois and Indiana, i.e., the Illinois Commerce Commission and the Indiana Public Service Commission.[4] Instead, ConRail posted a summary 60-day passenger train discontinuance notice, proposing to discontinue the trains by its own fiat, asserting its sole managerial prerogative, relying upon section 304 of the 3-R Act. 45 U.S.C. 744.

The court of appeals ruled that the summary discontinuance procedures of section 304(a) are not directly applicable to the Chicago-Valparaiso line because section 304(a) expressly excludes from its scope rail properties which the Final System Plan ("FSP"), promulgated by United States Railway Association ("USRA"), designated to be operated by ConRail. The FSP specified that Penn Central's Chicago-Valparaiso line be conveyed to ConRail. Moreover, the FSP specifically mentioned the Chicago-Valparaiso passenger trains, as subject to discontinuance only upon approval from the proper regulatory authorities. I FSP 46 (Pet., A25):

> "Services Never Covered by Leases or Contracts and Operated Over Lines to be Acquired by ConRail, Chessie or Amtrak.

[4] Pet., A12, A13.

"These services will be continued on the day of conveyance, USRA recommends that ConRail seek a satisfactory subsidy arrangement for provision of these services. If such agreements have not been executed by time of conveyance, USRA recomends that ConRail post these services for discontinuance. *Approval of such discontinuance must be obtained from the proper regulatory authorities.*" (emphasis supplied).

"The services along with the recommended owner of the property after conveyance are:

" *PC service between Chicago and Valparaiso, Ind. (ConRail)."

The FSP was issued July 25, 1975. The I.C.C. on August 25, 1975 issued its "Evaluation of the U.S. Railway Association's Final System Plan",[5] and interpreted the FSP as specifying that discontinuance of commuter service operated on a FSP line would require approval by the proper regulatory agencies in the normal manner. I.C.C. Evaluation p. 20 (Pet., A25):

". . . if commuter service is operated on a line which is included in the Final System Plan, the Act requires that this commuter service be continued whether it is subsidized or not. *Any proposed discontinuance of such services would require approval by the proper regulatory agencies in the normal manner.*" (emphasis supplied).

ConRail's argument in support of the summary discontinuance procedures of section 304(a) of the 3-R Act, rather

[5] The I.C.C.'s evaluation of the FSP was mandated by section 207(d) of the 3-R Act. 45 U.S.C. 527(d).

than the normal discontinuance procedures under the Interstate Commerce Act and state laws, rests upon the amendment made to section 304 of the 3-R Act by the so-called Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act").[6] Congress added a subsection 304(e) and reenacted the entire section 304 by means of section 804 of the "4-R Act". The same 4-R Act expressly approved the FSP. See: 45 U.S.C. 718(d)(1), 744.

The Court of Appeals correctly construed and harmonized the involved statutory provisions. Moreover, the motivation for enactment of section 304(e) was to provide for continuation of passenger service on *non*-final system lines. The vast preponderance of rail commuter service operated by ConRail's predecessors (Penn Central, Reading, Jersey Central and Erie Lackawanna) was provided by those railroads under subsidy contracts at the time the FSP was issued on July 25, 1975. It appeared that the only commuter trains not under some contract constituted less than one percent of the service, and embraced the 4 involved trains between Valparaiso-Chicago., 4 trains between Baltimore-Washington, 4 trains between Philadelphia-Newark, and 2 trains between Cleveland-Youngstown. In contrast with these 14 trains, an additional 1,727 commuter trains were operated under subsidy contract in Boston, New York, and Philadelphia. (Preliminary System Plan, at 171, 174; 40 Fed. Reg. 9321, 9503, 9506).

Although the FSP presented no difficulties for the Chicago-Valparaiso service, because the line was included in the FSP for conveyance to ConRail, there were problems in the East because the FSP excluded virtually all lines leading into the major Eastern passenger terminals. Moreover, the "leases

[6] P.L. 94-210. 90 Stat. 31. (February 5, 1976).

and agreements" exemption of section 302(b)(2) of the 3-R Act, 45 U.S.C. 742(b)(2), was construed narrowly, so as not to embrace the year-to-year contracts of many commuter authorities. I FSP 44-46.

The response by Congress was a re-enactment of section 304 of the 3-R Act, with a new subsection 304(e), as part of the 4-R Act, to deal with passenger service on the *non*-FSP lines.[7] But this did not change the necessity for regulatory approval for the discontinuance of service on FSP lines.

Finally, we note that in interpreting the specific statutory language claimed by ConRail to support summary discontinuance, i.e., section 304(e)(2) and 304(e)(4), 45 U.S.C. 744(e)(2)(4), the court of appeals gave weight to the Rule of the Last Antecedent. (Pet., A18-A19, A22-A23). This rule has a firm federal base in the interpretation of statutes. *United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972); Sutherland, *Statutory Construction*, Section 47.33 (4th Ed. 1973).

ConRail's New Notice

ConRail on April 17, 1979, just 8 days prior to filing its petition for a writ of certiorari, invoked the jurisdiction of the I.C.C. by filing a notice and supporting statement with the I.C.C., proposing to discontinue these Valparaiso-Chicago trains under the former section 13a(1) of the Interstate Commerce Act, now 49 U.S.C. 10908.[8] The I.C.C. on May 7, 1979 (served May 9), instituted an investigation into the proposed discontinuance.[9] By further order, the I.C.C. on May 17, 1979 (served May 22) has set a series of hearings on the proposed discontinuance.[10]

Although invoking the I.C.C.'s jurisdiction, ConRail continues to urge that the proposed discontinuance is governed by section 304 of the Rail Act, rather than by 49 U.S.C. 10908. The I.C.C.'s order of May 7 acknowledges the issue, and presumably the I.C.C. prior to September 21, 1979, will present its own views as part of its decision.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. ConRail's recent filing with the I.C.C., and the latter's institution of an investigation concerning the Chciago-Valparaiso proposed discontinuances, may have served to render the judgment of the Court of Appeals interlocutory in nature. The I.C.C.'s ultimate decision presumably will constitute a determination by that agency as to its own jurisdiction, and will consider other matters. ConRail thus wishes to have two strings to its bow, one before this Court and the other before the I.C.C., with the latter's decision subject to statutory review in the Court of Appeals. 28 U.S.C. 2341, et seq. (See pp. 1a-3a, *infra*.)

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[7] The Congress carefully considered the FSP with respect to commuter service, including the I.C.C.'s evaluation. Extensive hearings were held on this subject. There is no indication that Congress sought to change the requirement that discontinuance of service on FSP lines could be achieved without resort to regulatory approval.

[8] Petitioner alluded to this filing. (Pet., 4 fn. 2).

[9] The May 7 decision is set forth herein, *infra*, at pp. 1a-3a. The I.C.C. ordered ConRail to continue operation of the trains pending completion of the investigation, but not beyond September 21, 1979.

[10] The May 17 order is set forth herein, *infra*, at pp. 4a-6a.

This Court has a normal practice of denying interlocutory review. *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting); *Firemen v. Bangor & A.R. Co.*, 389 U.S. 327 (1967); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-58 (1916). The Court in *Amer. Const. Co. v. Jacksonville Railway*, 148 U.S. 372, 384 (1893), stated ". . . and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." Here, a finding by the I.C.C. that the Chicago-Valparaiso service is not performed at an avoidable loss would moot all of ConRail's arguments.

2. ConRail has failed to demonstrate the principal point urged in its petition, i.e., that the decision below raises a novel question which threatens the integrity of the intent of Congress (Pet., 5-8). ConRail has failed to show any other commuter service which is operated wholly on FSP lines; and the FSP does not indicate any other such service, apart from the 10 trains listed in the FSP which are in addition to the Chicago-Valparaiso service. ConRail's fear, expressed in its petition at pp. 6-7, is with respect to "mixed" service, i.e., where a given passenger train in the course of a single trip operates over a route comprised of both FSP and non-FSP lines. But such "mixed" trains are not in issue.

Moreover, any disagreements between ConRail and Southeastern Pennsylvania Transportation Authority ("SEPTA"), pending in the Third Circuit, should not be anticipated or litigated as part of this isolated Chicago-Valparaiso service, which exists alone and hundreds of miles apart from ConRail's commuter rail complex on the eastern seaboard.[11]

[11] Nos. 77-2420, 78-2245, and 79-1580, *Southeastern Pennsylvania Transportation Authority v. Interstate Commerce Commission.*

ConRail has not demonstrated the existence of any important federal question which could be settled by this court.

3. ConRail's arguments concerning the statutory provisions raise no controlling matters which were not encompassed in the decision by the court of appeals; however, we answer certain matters out of an abundance of caution.

ConRail for the first time asserts a purpose of the 4-R Act to "substitute competition for regulatory control", so as to relieve ConRail of a portion of federal regulation by the I.C.C. (Pet., 5-6).[12] The short answer is that the portion of the 4-R Act involving this Chicago-Valparaiso service does not deal with the ratemaking and regulatory reform portion of the 4-R Act, but instead is concerned with implementation of the FSP mandated by the 3-R Act (Title VI), and with Local Rail Service Continuation for lines excluded from the FSP (Title VIII).

ConRail errs in its concept of the statutory framework and interpretation. (Pet., 9-16). The court of appeals correctly observed that the final phrase in section 304(e)(2) refers to the last antecedent, i.e., abandonment, rather than to a discontinuance.[13] (Pet., A18-A19, A22-A23).

> . . . the Corporation . . . may (i) discontinue such rail passenger service, and (ii) with respect

[12] ConRail argues that the I.C.C.'s staff organization, Rail Service Planning Office ("RSPO") is to regulate commuter train service, in lieu of the I.C.C. or state regulatory commissions. (Pet., 5-8, 18). We cannot impute such an intention by the Congress to place the I.C.C.'s staff in control of the agency and above the agency on this matter.

[13] As observed by the court of appeals, a summary discontinuance under subsection (a) is *always* a prerequisite to summary abandonment under subsection (b). (Pet. A19 fn. 1).

> to rail properties not designated for inclusion in the final system plan, *abandon such properties pursuant to subsections (a) and (b) of this section,*

The rule of the last antecedent is stated in 82 C.J.S., Section 344:

> By what is known as the doctrine of "last antecedent", relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote; nor are they ordinarily to be construed as extending to following words.

Sutherland, *Statutory Construction* (4th Ed. 1973), Section 47.33:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of "the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence.

The California lower court decision cited by ConRail is simply wrong, and ConRail incorrectly reads the "conspiracy" clause as modifying the list of crimes in *Singer v. United States,* 323 U.S. 338, 341 (1945). (Pet., A13-A15 fn. 12).

A state or local subsidy for commuter service is not a *sine qua non* for ConRail's obligation to maintain commuter service, contrary to ConRail's argument. Moreover, the question of the substantive standard is not before the court.

(Pet., A21-A22). Rather, the standard is expressly now before the I.C.C., as stated in its order of May 7, 1979, *infra,* at pp. 1a-2a.

ConRail misreads section 304(g) of the 3-R Act, 45 U.S.C. 744(g). (Pet., 14-15). The import of section 304(g) is to impose a 2-year moratorium or "freeze" for the abandonment of property over which the I.C.C. has determined service is not required, such abandonment and discontinuance to he made under the applicable provisions of the Interstate Commerce Act. The key point is that section 304(g) illustrates that service included in the FSP–freight or passenger – is subject to the ordinary regulatory controls as in the case of any railroad proposing to discontinue or abandon railroad operations.

ConRail's argument that summary discontinuance can be construed from section 304(e)(4), by means of the proviso clause, was answered by the court of appeals. (Pet., 10, 15-16, A19-A20).

Finally, we wish to emphasize that the legislative re-enactment of section 304 of the 3-R Act, by means of section 804 of the 4-R Act, was made by the Congress after extensive hearings, with no attempt to alter the FSP's requirement that normal regulatory means are necessary to discontinue any passenger service specifically embraced within the FSP.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1979

DI Service Date May 9, 1979

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29021F[1]

CONSOLIDATED RAIL CORPORATION (CONRAIL)– DISCONTINUANCE OF PASSENGER TRAINS NOS'. 453-456 BETWEEN VALPARAISO, IN, AND CHICAGO, IL.

Decided: May 7, 1979

On April 17, 1979, the Consolidated Rail Corporation (ConRail) filed a notice and supporting statement seeking to discontinue certain rail passenger service pursuant to 49 U.S.C. 10908 and 49 C.F.R. Part 1122.

ConRail proposes to discontinue service on its passenger trains Nos. 453, 454, 455, and 456 between Valparaiso, IN, and Chicago, IL, effective May 21, 1979.

Complaints from concerned persons have been received requesting suspension of the proposed discontinuance pursuant to 49 U.S.C. 10908(b), pending an investigation to determine the extent of public need for the rail service.

We note that discontinuance of the rail passenger service may not be warranted by the public convenience and necessity. We further note that continued operation of the involved trains may not unduly burden interstate commerce. Thus, continued operation of the affected transportation may be appropriate under 49 U.S.C. 10908(c).

---

[1] This proceeding stems out of an earlier ConRail discontinuance application in Finance Docket No. 28954F, which was rejected by the entire Commission for jurisdictional infirmities in *Consolidated Rail Corporation – Discontinuance*, 360 I.C.C. 108 (1979).

ConRail, however, contends that the proper standard for determining the appropriateness of the proposed discontinuance is not 49 U.S.C. 10908, but rather section 304 of the Regional Rail Reorganization Act of 1973 (3-R Act) (45 U.S.C. 744), and that the discontinuance should be summarily approved under that section. In the alternative, ConRail argues that the discontinuance would conform with 49 U.S.C. 10908(c), and that we should thus approve the discontinuance under that section without issuing an investigation or train-continuance order pursuant to 49 U.S.C. 10908(b).

Since ConRail's contentions raise significant issues regarding the proper standard governing the proposed discontinuance – and since the discontinuance may have serious effects on the public interest and the environment – we shall institute an investigation into the proposed discontinuance and order ConRail to continue the transportation pending completion of the investigation (but not to exceed 4 months from the proposed discontinuance date of May 21, 1979). *See* 49 U.S.C. 10908(b).

Due and timely execution of the Commission's functions in this proceeding requires the omission of an Administrative Law Judge's initial decision.

It is ordered:

(1) An investigation of the proposed discontinuance is instituted under 49 U.S.C. 10908(b), and the matter is assigned for hearing at a time and place to be fixed.

(2) The investigation shall embrace – and the parties shall be prepared to present evidence regarding – among other things, the feasibility of requiring total or partial continuance of the described rail service. Such inquiries regarding continued service shall include (but not be limited to): service over a segment of the route; weekend, seasonal, holiday, or special-run service; mixed passenger/freight service; or a combination of the foregoing or other limited services.

(3) The continued operation of trains Nos. 453, 454, 455, and 456 between Valparaiso, IN, and Chicago, IL, is required on their existing schedules and routes, pending hearing and decision in this investigation (but not for longer than 4 months beyond the proposed discontinuance date of May 21, 1979) unless otherwise subsequently ordered.

(4) An initial decision by an Administrative Law Judge is omitted, and the record shall be considered as certified to the Commission (Division 1) for initial decision.

By the Commission, Division 1, Commissioners Gresham, Brown, and Clapp.

H. G. HOMME, JR.
Secretary

(SEAL)

79-229

Service Date
May 22, 1979

ORDER

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29021F

CONSOLIDATED RAIL CORPORATION (CONRAIL)–
DISCONTINUANCE OF PASSENGER TRAINS
NOS. 453-456 BETWEEN VALPARAISO, IN
AND CHICAGO, IL

(Investigation under 49 USC 10908(b))

IT IS ORDERED:

That this proceeding is hereby referred to an Administrative Law Judge and assigned for hearing at the times and places designated below.

On June 25, 26, and 27, 1979, at 9:30 a.m. Local Time, at Chicago, Illinois, in a hearing room to be later designated, to hear evidence, presented by (1) the Consolidated Rail Corporation (Conrail) or persons supporting the proposals, including cross-examination thereon, (2) protestants, including cross-examination thereon, or (3) as may be directed by the Administrative Law Judge.

On June 27, 1979, at 7:00 p.m. Local Time at Whiting, Indiana, in a hearing room to be later designated, to hear evidence, presented by (1) protestants, including cross-examination thereon, or (2) as may be directed by the Administrative Law Judge.

On June 28, 1979, at 7:00 p.m. Local Time, at Gary, Indiana, in a hearing room to be later designated, to hear evidence, presented by (1) protestants, including cross-examination thereon, or (2) as may be directed by the Administrative Law Judge.

On June 29, 1979, at 7:00 p.m. Local Time, at Hobart, Indiana, in a hearing room to be later designated, to hear evidence, presented by (1) protestants, including cross-examination thereon, or (2) as may be directed by the Administrative Law Judge.

On June 30, 1979, at 10:00 a.m. Local Time, at Valparaiso, Indiana, in a hearing room to be later designated, to hear evidence, presented by (1) protestants, including cross-examination thereon, or (2) as may be directed by the Administrative Law Judge.

Consolidated Rail Corporation (Conrail) shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in its petition for authority to discontinue the above trains, and the exhibits attached thereto.

The carrier shall be prepared to present evidence on, among other things, all facts and matters (including applicable traffic, revenue, cost, and other data) pertaining to the feasibility of requiring the continuance in part of the said train service, including, but not limited to service over a segment of the route; week-end, seasonal, holiday, or special run service, or mixed passenger-freight service; or a combination of the foregoing or other limited service.

Any person desiring to cross-examine witnesses of the Consolidated Rail Corporation (Conrail) at designated locations of hearing other than at the place of initial hearing as ordered above shall either (1) prior to the initial hearing file with the Commission such a request along with the justification therefor and a certification that a copy thereof has been

served upon the railroad, or (2) appear at the initial hearing and justify such a request to the Administrative Law Judge. Such a request may be granted or denied by the Commission or the Administrative Law Judge.

A copy of the petition and all related exhibits shall be supplied by the carrier immediately upon request by any person expecting to actively participate in the hearing.

All written testimony, including exhibits, proposed to be offered at the hearing by the carrier, so far as practicable, shall be served on state regulatory bodies or others making requests of said carrier therefor. Written testimony and exhibits of protestants or state regulatory bodies, so far as practicable, shall be served on Consolidated Rail Corporation (Conrail). Service in each instance shall be made by depositing such documents as first-class mail not later than seven (7) days prior to the initial hearing which requirement may be waived by the Administrative Law Judge at the hearing, for good cause.

The Consolidated Rail Corporation (Conrail) shall, within 10 days of the service dateof this order, post a copy of this order in a conspicuous place in each station, depot, car, or other facility in which it is required to post a notice of the proposed change in service (49 C.F.R. 1122); and shall certify to this Commission, within 15 days of the service date of this order, that said posting has been made.

Dated at Washington, D.C., this 17th day of May 1979.

By the Commission, Robert N. Glennon, Chief Administrative Law Judge.

H. G. HOMME, JR.
Secretary

(SEAL)